The principal allegations of the complaint are that respondents maintain racial segregation in the public schools administered by them; that petitioners had filed a petition with respondents requesting that segregation be abolished; and that respondents refused to abolish racial segregation, all in violation of the Fourteenth Amendment to the United States Constitution, and 42 U. S. C. 1981. The complaint prayed for an injunction ordering the respondents "to promptly present a plan of desegregation to [the] Court which will expeditiously desegregate the schools in Montgomery County," and for a general injunction prohibiting racial segregation.

The answer in general pleaded that petitioners had failed to exhaust an administrative remedy adopted by resolution and subsequently, in substance, by statute, allowing individual Negro children to seek change of assignment from board imposed segregation; that respondents had no power under then existing state statutes to act pursuant to the petition seeking desegregation; and that respondents had adopted a resolution denying the request for desegregation. This resolution was set forth in *haec verba* in the answer; it provided that the schools should continue to operate during the then forthcoming 1954-55 school term as they had in the past, awaiting the final decree of this Court in *Brown* v. *Board of Education*, 347 U. S. 483, which was then awaiting further argument on formulation of the decree. The resolution stated:

> The Board deems it for the best interest of public education to await the final decree of the Court and in the meantime operate the public schools of North Carolina as now constituted (R. 15a).

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[2] Various preliminary proceedings in the District Court, unimportant for purposes of this petition, including amendments to the pleadings and several motions, are described in the opinion of the District Court (R. 50a-51a).

The answer further asserts that after the 1955 decision in *Brown v. Board of Education*, 349 U. S. 294, another resolution, also set forth in the answer, was adopted by respondents. This resolution provided:

> "Now, therefore, be it resolved that the Public Schools of Montgomery County operate during the 1955-56 term with practices of enrollment and assignment of children similar to those in use during the 1954-55 school year, and that this resolution be the authority for the County Superintendent and the various district school principals and officials to so act (R. 18a, 19a).

There was a proviso that parents dissatisfied with the assignment of their children might apply to the principal of the school to which assignment was desired, and if unsuccessful, to the county board of education, requesting a change of assignment (R. 19a). The Court of Appeals found that the system of planned segregation continues to the present time, 264 F. 2d 780, 783; R. 78.

On March 26, 1958 respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and petitioners' motion for leave to file a supplemental complaint[1] and to add parties defendant, were heard. The District Court granted the motion to dismiss, and denied the motion to file a supplemental complaint and to add parties defendant, holding that since petitioners had not alleged that they had exhausted the remedies prescribed by the North Carolina Assignment and Enrollment of Pupils Act they were not entitled to injunctive relief in the federal courts, and that both the original and the proposed supplemental complaints failed

[1] The supplemental complaint would have made state education officials parties defendant. That aspect of the case is not brought here by this petition.

to state a claim upon which relief might be granted. The District Court entered judgment dismissing the cause on October 6, 1958, and the judgment was appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals entered a decree affirming the judgment of the District Court on March 19, 1959.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals conflicts with the decisions of this Court in *Brown* v. *Board of Education* and *Cooper* v. *Aaron*.

The disposition the Court of Appeals made of this case conflicts with the holdings of this Court that the Fourteenth Amendment requires the state to discontinue its practice of assigning pupils in its public schools on the basis of their race. *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1. As delineated in *Cooper*, the constitutional injunction requires " 'a prompt and reasonable start toward full compliance' " and action "necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed' " (358 U. S. at 7). Indeed, "in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools," and even where "relevant factors" might establish justification "for not requiring the present nonsegregated admission of all qualified Negro children" it is essential that the school authorities show that they "had developed arrangements pointed toward and had taken appropriate steps to put their program into effective operation . . ." "[O]nly a prompt start, diligently and earnestly pursued, to eliminate

racial segregation from the public schools could constitute good-faith compliance" (*Id.* at 7).

In sum, as this Court emphasized in *Cooper*:

> State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system (*Id.* at 7).

and that,

> State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws (*Id.* at 19).

In 1954, Montgomery County ignored the first pronouncement in *Brown* and adhered to its pre-existing pattern of racially separated public schools by resolving to continue operation of the county's then segregated schools as "now constituted" (R. 15a). It remained aloof to its constitutional responsibilities when, a year later, it resolved to continue for 1955-56 "practices of enrollment and assignment of children similar to those in use during the 1954-55 school year . . ." (R. 18a-19a). The Court of Appeals recognized the intransigent attitude of the school authorities toward petitioners' request for desegregation:

> We are advertent to the circumstances upon which the plaintiffs rest their case, namely, that the County Board has taken no steps to put an end to the planned segregation of the pupils in the public schools of the county but, on the contrary, in 1955 and subsequent years, resolved that the practices of enrollment and assignment of pupils for the ensuing year should be similar to those in use in the current year. 264 F. 2d at 783 (R. 78).

With this acknowledgment, the Court should at this point have directed that petitioners be awarded injunctive relief against the clear constitutional violation. Instead, the Court held that respondents may continue the pattern of segregated schools, resulting from the practice of assignment by race, if children are provided an administrative procedure by the use of which they may individually seek to escape the discrimination. The possibility of an escape, it felt, is afforded by the board's resolutions and the state pupil assignment law, which for all relevant purposes are the same; the District Court's dismissal of the complaint was affirmed on the ground that this "remedy" should have been exhausted. In short, it approved respondents' practice of initially assigning school children on a racial basis, and requiring their attendance in segregated schools, simply because each child might individually undertake an administrative course which might lead to his reassignment to another school in an otherwise segregated system.

Such an arrangement falls far short of satisfying the constitutional mandate that the state abstain from racial classifications in its public school system. The continued funneling of Negro children into Negro schools and the requirement that they continue attending such schools, even though subject to the possibility of securing individual reassignment to another school, does not constitute an arrangement for desegregating the schools or even a step in that direction. Rather, it is a general requirement of racial classification of all children until and unless particular children may succeed in administratively excepting themselves from its operation.

This Court's decisions in *Brown* and *Cooper* establish the right of all children to freedom from state imposed educational segregation based on color. They make plain the state's duty to afford, not merely an ostensible freedom,

but freedom in fact, and do not contemplate an arrangement perpetuating segregation subject to an individual administrative procedure by which that freedom can be achieved only in isolated instances. Moreover, the command of the Fourteenth Amendment against racial discrimination is addressed to the state and is disobeyed by a requirement that burdens the individual with the necessity of demonstrating an exception in his favor from the general policy of racial classification and discrimination which it continues. Obviously, the state cannot be permitted to shift to the individual the responsibilities which the Constitution imposes upon it. The duty is upon the state, rather than the individual, to bring the unconstitutional system which it has constructed to an end, and this duty, like the right with which it is correlated, "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Cooper* v. *Aaron*, *supra*, 358 U. S. at 17. See also *Lane* v. *Wilson*, 307 U. S. 268.

Moreover, in petitioners' view, the Pupil Assignment Statute is irrelevant to the present issue and the doctrine of exhaustion of administrative remedies has no application to this case. The statute does not afford the administrative means capable of furnishing the relief to which petitioners are entitled; it neither requires segregation nor affords a means of eliminating segregation. It permits continuation of a racially classified system— including the initial assignment of first graders to segregated schools—subject solely to the exception that individual Negro students may

[1] No class proceedings are permitted under the Pupil Assignment Statute. See the instant case at 264 F. 2d 783; Joyner v. Board of Education, 244 N. C. 164, 92 S. E. 2d 795 (1956).

thereafter seek assignment to "white" schools. Relevant portions of the Act state:

> If, at the hearing, the board shall find, that *the child* is entitled to be reassigned to *such* school, or if the board shall find that the reassignment of *the child* to *such* school will be for the best interests of *the child*, and will not interfere with the proper administration of *the school*, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that *the child* be reassigned to and admitted to *such* school. (Emphasis supplied.)

At most, this remedy could only enable a particular child to secure entry to a particular school. Petitioners' constitutional right is not so limited. They desire, and view the Constitution as securing, the opportunity to attend school in a nonsegregated system. Any administrative remedy adequate from this viewpoint must be one which affords an opportunity to abolish racial distinctions within the school system and put an end to what the Court of Appeals called "the planned segregation of the pupils of the public schools of the county."[*] The placement statute obviously does not supply such an opportunity.

Despite the shortcomings of the statute, however, the school board, within the general powers conferred upon it, could grant the type of relief which petitioners requested. Petitioners pursued *that* administrative remedy by a petition asking the board to prepare and pursue a plan of general desegregation. The petition charged that the board's segregation practices violated the Constitution and prayed that "all schools under your jurisdiction be immediately desegregated in accordance with the Supreme Court's deci-

[*] 264 F. 2d at 783.

sion" (R. 24a). This the board refused to do, insisting upon a power to continue segregation subject to individual exceptions which may be sought via the pupil placement plan. Similarly, the complaint in this case did not ask for entry of a particular child to a particular school. It prayed that the Court order "defendants to promptly present a plan of desegregation to this Court which will expeditiously desegregate the schools in Montgomery County . . ." (R. 9a).

More fundamentally, neither the assignment statute nor the exhaustion doctrine has relevance in this case save as attempted justifications for respondents' past and present segregation practices. For it is because petitioners declined to undertake the statutory assignment procedures that they have been denied relief by the school authorities and the courts below. Meanwhile, respondents continue to assign children to racially segregated schools, and assert no present intention to abandon the practice, and seek refuge in the assignment legislation when requested to desist therefrom. But it is very clear that the constitutional violations evident from respondents' conduct cannot be excused by resort to the statute. The Constitution, as interpreted by this Court, incorporates "the fundamental principle that racial discrimination in public education is unconstitutional"—a doctrine supreme to the point that: "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." *Brown* v. *Board of Education*, 349 U. S. 294, 298. Neither the North Carolina assignment statute nor any other law can justify the constitutional violations that respondents continue to commit, and, so long as these violations continue, neither this Court nor the petitioners need have concern with a state law having to do only with the individual assignment of children to particular schools.

II.

The decision of the Court below conflicts with the decisions of another Court of Appeals, and the conflict should be resolved by this Court.

The Court of Appeals for the Fourth Circuit has consistently held that state administrative remedies must be exhausted prior to judicial application for relief from segregated schooling. *Carson* v. *Board of Education of McDowell County*, 227 F. 2d 789 (4th Cir. 1955); *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956), cert. denied 353 U. S. 910. On the day that it decided the instant case it also decided *Holt* v. *Raleigh City Board of Education*, 265 F. 2d 95, 98 (4th Cir. 1959), in which the Raleigh City Board of Education also was found to be continuing racial segregation. The Court held:

> The regulations adopted by the Board in 1957, pursuant to §115-176 of the statute, tended to perpetuate the system, for they provided that each child attending a school by assignment of the Board is assigned to the same school for the ensuing school year.

The Court of Appeals for the Fifth Circuit, however, has recognized the constitutional infirmity in a position like that taken by the Montgomery County Board and endorsed by the Fourth Circuit. The Fifth Circuit in *Gibson* v. *Board of Public Instruction of Dade County*, 246 F. 2d 913 (5th Cir. 1957) dealt with an essentially identical legal situation. The Dade County School Board had adopted a resolution substantially the same as that adopted by the Montgomery County Board. The Dade County Board had resolved:

> "It is deemed by the Board that the best interest of the pupils and the orderly and efficient administration of the school system can best be preserved if the registration and attendance of pupils entering school com-

> mencing the current school term remains unchanged. Therefore, the Superintendent, Principals and all other personnel concerned are herewith advised that until further notice the free public school system of Dade County will continue to be operated, maintained and conducted on a nonintegrated basis" (at 914).

The plaintiffs in the *Gibson* case had requested, in language almost identical to the request of the plaintiffs in the instant case, that "the Board of Public Instruction . . . abolish racial segregation in the public schools of the County as soon as is practicable in conformity with the decision of the Supreme Court of the United States in *Brown v. Board of Education*" (at 913). In defense the Dade County Board had argued that plaintiffs had not exhausted their administrative remedies provided by the Florida Pupil Assignment Act. Judge Rives ruled that recourse to the Pupil Assignment Act could not be required until the policy of segregation is first abolished:

> "The appellees urge also that the judgment should be affirmed because the plaintiffs have not exhausted their administrative remedies under the Florida Pupil Assignment Law of 1956, Chapter 31380, Laws of Florida, Second Extraordinary Session 1956, F. S. A. §230.-231. Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools. So long as that requirement continues throughout the public school system of Dade County, it would be premature to consider the effect of the Florida laws as to the assignment of pupils to particular schools."

On remand to the district court, that court held that the state pupil assignment law is a plan of desegregation. *Gibson v. Board of Public Instruction of Dade County*, 170 F. Supp. 454 (D. Fla. 1959). This ruling is now on appeal.

"The district court erred in dismissing the complaint. Its judgment is reversed and the cause remanded" (at 913-914).

Similarly, in *Holland* v. *Board of Public Instruction*, 258 F. 2d 730, Judge Rives held for the Court of Appeals that the procedures afforded by the Florida Pupil Assignment Act need not be employed until the policy of segregation first was abolished in Palm Beach County. In that case, it may be noted, the county continues to enforce a residential segregation ordinance like that outlawed by *Buchanan* v. *Warley*, 245 U. S. 60. But the question of residential segregation was hardly crucial to the case as, obviously, it is possible to have school desegregation with residential segregation and *vice versa*. The fact of compulsory residential segregation merely served to underscore the discriminatory approach to law enforcement employed by the county government.

In the *Holland* case the plaintiff had applied to a school farther from his home than the Negro school to which he was assigned. The District Court had indicated, among other reasons, that because the plaintiff was assigned to the nearest school his constitutional rights had not been infringed. But, as Judge Rives wrote, "that the plaintiff was ineligible to attend the school to which he applied would not, however, excuse a failure to provide nonsegregated schools." If the Pupil Assignment Statute had governed it would seem that the distance of the "white" school from plaintiff's home would have concluded the matter and permitted the continued segregation of plaintiff.

While a conflict between a Court of Appeals and a District Court is not as compelling a reason for granting certiorari as a conflict between two Courts of Appeal, it is worthy of note that, in addition to the difference between the Fourth and Fifth Circuits, the United States

District Court for the Middle District of Tennessee is in accord with the Fifth Circuit. In *Kelly v. Board of Education of the City of Nashville*, Judge William E. Miller addressed himself directly to the rulings of the Fourth Circuit. He pointed out that the relief which the Nashville plaintiffs sought was not merely to attend a particular school, but to attend schools in a system devoid of racial classifications. The pupil assignment law did not furnish a remedy to achieve this end:

> "However, notwithstanding the apparent scope and generality of the rulings of the Fourth Circuit in the two cases just cited, the Court is unable to reach the conclusion on the facts of the instant case that the action should be dismissed and the plaintiffs remitted to a so-called administrative remedy, with the implied invitation to return to the Federal Court if that remedy is exhausted without obtaining satisfactory results. This is true because the Court is of the opinion that the administrative remedy under the Act in question would not be an adequate remedy. In this connection, it must be recalled that the relief sought by the complaint is not merely to obtain assignment to particular schools but in addition to have a system of compulsory segregation declared unconstitutional and an injunction granted restraining the Board of Education and other school authorities from continuing the practice and custom of maintaining and operating the schools of the city upon a racially discriminatory basis." 159 F. Supp. at 275.

The conflict is clear. While petitioners submit that the Fifth Circuit is correct and the Fourth Circuit is wrong, this Court, in any event, should resolve the difference in the interest of uniformity where so important a constitutional right is involved.

III.

The decision below presents important questions of federal jurisdiction, practice and procedure which should be resolved by this Court.

This Court exercises supervision over the lower federal judiciary to assure the proper and efficient functioning of the District Courts. See, e.g., *McNabb* v. *United States*, 318 U. S. 332, 341 (administration of criminal justice); *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (forum non conveniens doctrine); *Hickman* v. *Taylor*, 329 U. S. 495 (construction of federal rules of civil procedure). This case invokes such power. See Wolfson and Kurland, *Robertson and Kirkham Jurisdiction of the Supreme Court of the United States*, §353 (1951).

In *Brown* v. *Board of Education*, 349 U. S. 294, this Court provided certain general guides to the lower federal courts for the disposition of school segregation litigation. In delineating the types of matters to be considered by the lower federal courts in framing decrees dealing with "a variety of local problems," this Court emphasized the use of "practical flexibility" toward the end of eliminating "a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [the] May 17, 1954 decision." None of these criteria even suggested that segregation may continue to be maintained. But the Court of Appeals, while explicitly recognizing that the respondent school board has taken "no steps to put an end to the planned segregation of the pupils in the public schools of the country," 264 F. 2d at 783, held that petitioners and the class they represent, were not entitled to require that respondents discontinue the system of planned segregation. The remedy was held to be an injunctive order requiring the admission of in-

dividual Negro litigants to designated schools, after they have exhausted the state's prescribed administrative "remedy." This view of the District Courts' duty will necessitate a detailed review of individual school assignments by the federal judiciary for a very large number of pupils who contend that they are excluded from particular schools because of race. Insofar as the efficient functioning of the federal judiciary is concerned, the burden of individual review of school assignments promises to become insupportable.[8]

At the second reargument of *Brown* v. *Board of Education, supra*, perhaps the most frequently voiced concern of the parties and *amici* alike was that implementation of the decision should not involve the federal judiciary in the day-to-day administration of local school systems. Or, as it was so often stated, the courts should not become school boards.[9]

Indeed, although petitioners do not suggest that the *amicus curiae* brief of the State of North Carolina in the School Segregation cases is binding upon it in this litigation, it is suggestive to note that in that brief the State suggested as possible modes of compliance:

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[8] It is true that the Court of Appeals' decision contemplates that class action may be brought (R. 78). But the members of the class are those who have employed the so-called Pupil Placement remedy. Since the pupil placement remedy involves individualized consideration of each child's right to attend a particular school a factual review of each child's right to attend a particular school is called for. At best, then, the right to bring a class suit in this sense means that many suits may be consolidated. Under petitioners' view, however, the courts should be concerned solely with the issue of whether a racial standard is employed.

[9] See, e.g., the Brief of Attorney General of Florida as *amicus curiae* in Brown v. Board of Education, October Term, 1954 at page 82; brief of Attorney General of the State of Texas as *amicus curiae* at page 26; brief of the Attorney General of the State of Arkansas as *amicus curiae* at page 18.

(1) Assignments of white and Negro children to schools on the basis of residence alone;

(2) Segregation of children in schools on the basis of sex, the basis of intelligence tests, the basis of achievement tests, or any other basis except race, provided only that the basis has a reasonable relation to the proper conduct of the schools or to the maintenance of the public safety, morals, health or welfare . . . ;

(3) Discontinuance of the present state-wide school system and leaving to each county or community the decision as to whether it will have public schools operated on the one or the other of these bases. . . . It is submitted that the choice to be made between these or other methods leading to a constitutional result is for the State of North Carolina.[10]

It was not suggested that segregation could be maintained subject to individual transfers out of segregated schools.

Already federal courts in North Carolina have had before them under the rule applied in this case[11] a substantial number of cases involving pupils on whose individual qualifications to attend particular school buildings, or the regularity of the administrative proceedings in which they must first seek vindication of their constitutional rights, the courts must pass if the rationale of the instant decision is correct.

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[10] At page 13.

[11] See, e.g., Holt v. Raleigh City Board of Education, 265 F. 2d 95 (4th Cir. 1959); McKissick v. Durham City Board of Education (D. C. M. C. N. C., Civil Action No. C-100-D-58); Morrow v. Mecklenburg County Board of Education (D. C. W. D. N. C., Civil Action No. 1415); McCoy v. Greensboro City Board of Education (D. C. M. D. N. C., Civil Action No. C-28-G-59); Cannon v. Greensboro City Board of Education (D. C. M. D. N. C., Civil Action No. C-25-G-59); Jeffers v. Whitley, 165 F. Supp. 951 (D. C. N. C. 1958).

Petitioners, however, view the federal judiciary's role as being solely to eliminate the use of racial standards in the system and not to become involved in multitudinous individual assignments. While an individual's qualifications might, of course, be relevant in attempting to ascertain whether a board is employing subterfuge, a typical segregation suit should concern itself only with whether race is used as a standard of school assignment. Where, as here, race is used, it should merely be eliminated by application of a constitutionally acceptable plan of desegregation.

Moreover, the proper functioning of the district court was violated in yet another way. As Mr. Justice Frankfurter stated concurring in *Hurd* v. *Hodge*, 334 U. S. 24, 36, "equity is rooted in conscience." Equitable doctrines, therefore, may not be invoked by those who, as that opinion pointed out, violate the constitution of the United States by racial discrimination—a violation not "narrow" or "technical," but involving "considerations that touch rights so basic to our society that, after the Civil War, their protection against invasion by the States was safeguarded by the Constitution." Here respondents segregate. When petitioners applied to equity for relief, respondents prayed that the chancellor remit petitioners back to respondents in the exercise of an equitable doctrine of self restraint. But, petitioners submit, a court of equity should not have its patience invoked by those who have baldly continued to apply a constitutionally forbidden standard. Employment of such a rule calls for the corrective supervision of this Court.

Unless the erroneous decision of the court below is rectified so that the District Court will proceed in cases of this sort under the general directions of *Brown* v. *Board of Education* and *Cooper* v. *Aaron* discussed *supra*, not only will the rights here involved continue to be denied, but the Federal Courts will indeed become overburdened, and as

some have feared, in fact take on the role of local boards of education in the name of equity at the behest of those who have come into court without clean hands.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Kenneth Lee
P. O. Box 645
Greensboro, North Carolina

Conrad O. Pearson
203½ E. Chapel Hill Street
Durham, North Carolina

Thurgood Marshall
Jack Greenberg
10 Columbus Circle
New York 19, New York
Counsel for Petitioners

Elwood H. Chisolm
James M. Nabrit, III
Frank D. Reeves
Spottswood W. Robinson, III
Of Counsel

APPENDIX

North Carolina Assignment and Enrollment of Pupils Act Article 21

§ 115-176. *County and city boards authorized to provide for enrollment of pupils.*—Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this Article, the authority of each board of education in the matter of assignment of children to the public school shall be full and complete, and its decision as to the assignment of any child to any school shall be final. A child residing in one administrative unit may be assigned either with or without the payment of tuition to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards. No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this Section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this Article.

§ 115-177. *Authority to be exercised for efficient administration of school, etc.; rules and regulations.*—In exer-

cising the authority conferred by § 115-176, each county or city board of education may, in making assignments of pupils, give individual written notice of assignment, on each pupil's report card or by written notice by any other feasible means to the parent or guardian of each child or the person standing in loco parentis to the child, or may give notice of assignment of groups or categories of pupils by publication at least two times in some newspaper having general circulation in the administrative unit.

§ 115-178. *Hearing before board upon denial of application for enrollment.*—The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication therefor, apply in writing to the board of education for the assignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration

of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail.

§ 115-179. *Appeal from decision of board.*—Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the Judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

Opinion

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION
Civil No. 323-R

* * * * *

STANLEY, *District Judge*:

The complaint in this action was filed on July 29, 1955, as a class action by thirteen adult plaintiffs personally and as next friend of forty-five minor plaintiffs, on behalf of themselves and all other citizens and residents of Montgomery County, North Carolina, similarly situated. Named as defendants are the Superintendent of Schools of Montgomery County, North Carolina, and the individual members of the Montgomery County Board of Education.

In their complaint, plaintiffs asked (1) that a three-judge court be convened, (2) that interlocutory and permanent judgments be entered "declaring that Article IX, Section 2, of the North Carolina Constitution, and any customs, practices and usages pursuant to which plaintiffs are segregated in their schooling because of race, violate the Fourteenth Amendment to the United States Constitution", and (3) that interlocutory and permanent injunctions issue "ordering defendants to promptly present a plan of desegregation to this court which will expeditiously desegregate the schools in Montgomery County and forever restraining and enjoining defendants and each of them from thereafter requiring these plaintiffs and all other Negroes of public school age to attend or not to attend public schools in Montgomery County because of race."

Plaintiffs were allowed to amend their complaint on August 12, 1955, but without changing the nature of their cause of action. Thereafter, an order was signed denying plaintiffs' motion for a three-judge court.

After receiving an extension of time within which to answer, the defendants filed their answer on September 12, 1955, alleging failure to exhaust administrative remedies and lack of good faith on the part of the plaintiffs in bringing the action. Upon motion of plaintiffs, a portion of the answer charging plaintiffs with lack of good faith was stricken.

Thereafter, plaintiffs filed a motion to amend their complaint to allege that defendants are officers of the State of North Carolina, enforcing and executing state statutes and policies. After a hearing on this motion, an order was entered by the court on December 16, 1955, allowing the amendment.

On February 23, 1956, plaintiffs petitioned the court to reconsider its order denying their motion for a three-judge court. This motion was again denied in an opinion rendered by Judge Johnson J. Hayes on April 6, 1956. *Covington v. Montgomery County School Board*, 139 F. Supp. 161 (M. D. N. C., 1956).

On September 13, 1956, plaintiffs filed a motion for leave to file amended and supplemental complaint and to add parties defendant. In the supplemental complaint, plaintiffs seek to test the constitutionality of certain state school laws, commonly known and referred to as the "Pearsall Plan," and seek to make the members of the State Board of Education and the Superintendent of Public Instruction of the State of North Carolina parties defendant. Thereafter, the Attorney General of the State of North Carolina made a special appearance on behalf of members of the Board of Education and the State Superintendent of Public Instruction in opposition to plaintiffs' motion,

and the defendants filed a motion to dismiss the complaint for failure to state a claim on which relief could be granted, and for failure to prosecute.

A hearing on pending motions was held on March 26, 1958, at which time the Court ordered the parties to file briefs setting forth their legal contentions on all issues raised by the pleadings and the pending motions. The Attorney General of the State of North Carolina was directed to file a brief with the court with respect to his position on all the issues raised in the pleadings.

The principal questions now before the court for determination are (1) whether the complaint, or proposed amended and supplemental complaint, states a claim against the defendants on which relief can be granted, and (2) whether the members of the State Board of Education and the State Superintendent of Public Instruction are necessary and proper parties to the action.

The decision that has been reached on the first question makes a determination of the second question unnecessary for disposition of this case. However, in regard to the second question, this court has today rendered an opinion in another case, *John L. Jeffers, et al. v. Thomas H. Whitley, Superintendent of the Public Schools of Caswell County, et al.*, —— F. Supp. —— (D. C. M. D. N. C., 1958), in which it was held that the members of the State Board of Education and the State Superintendent of Public Instruction are neither necessary nor proper parties in actions of this type.

In regard to the first issue, it should be stated at the outset that the plaintiffs have not alleged in either their original complaint, or in their proposed amended and supplemental complaint, that there has been any exhaustion of their administrative remedies as provided for in Sec. 115-176 through 115-178 General Statutes of North Carolina, known as the Enrollment and Assignment of Pupils

Act. Indeed, in their brief, plaintiffs admit that they did not proceed under this act, and contend that exhaustion of administrative remedies provided for by the act are unnecessary.

Counsel for the plaintiffs make this contention in face of the decisions rendered by the Court of Appeals for this circuit in *Carson* v. *Board of Education of McDowell County*, Cir. 4, 227 F. 2d 789 (1955), and *Carson* v. *Warlick*, Cir. 4, 238 F. 2d 724, certiorari denied 353 U. S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664.

They advance the argument that the presumption relied on in *Carson* v. *Warlick*, *supra*, that school officials "will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids" is not valid because of the length of time that has passed since the decision of the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), without the defendant's acting to desegregate the public schools of Montgomery County. The fallacy of this argument is readily seen when one reflects on what the Supreme Court actually held in the *Brown* case. As has been repeatedly stated, the *Brown* case does not require integration, but only holds that states can no longer deny to anyone the right to attend a school of their choice on account of race or color. *Briggs* v. *Elliott*, 132 F. Supp. 776 (E. D. S. C., 1955); *Thompson* v. *County School Board of Arlington County*, 144 F. Supp. 239 (E. D. Va., 1956); *School Board of City of Newport News, Va.* v. *Atkins*, 246 F. 2d 325 (1957).

Counsel for plaintiffs further contend that even if the Assignment and Enrollment of Pupils Act is constitutional, it need not be complied with in this case because the provisions of the act are being unconstitutionally applied. This argument is completely untenable in view of the fact

that there is no allegation that any of the plaintiffs ever sought to comply with the provisions of the act. Not until each of the plaintiffs has applied to the Board of Education of Montgomery County as individuals, and not as a class, for reassignment, and have failed to be given the relief sought, should the courts be asked to interfere in school administration. *Carson* v. *Warlick, Supra.*

The requirement for plaintiffs in suits of this type to exhaust administrative remedies before seeking injunctive relief in the federal court is discussed at some length in the case of *Joseph Hiram Holt, Jr.* v. *Raleigh City Board of Education*, —— F. Supp. —— (M. D. N. C., 1958), decided on August 29, 1958. Reference is made to that case for further discussion of my views on this subject.

In view of the plain holding of the Court of Appeals for this circuit in the *Carson* cases, and in view of the fact that the plaintiffs do not allege that they have exhausted, or have even attempted to exhaust, their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, I conclude that the plaintiffs have failed to state a claim against the defendants in either their original complaint or their proposed amended and supplemental complaint, on which relief can be granted, and that this action should be dismissed.

A judgment will be entered in conformity with this opinion.

This the 12th day of September, 1958.

/s/ EDWIN M. STANLEY,
United States District Judge

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 7802.

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Before Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

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Per Curiam:

The parents of a number of Negro children in Montgomery County, North Carolina, brought this suit to secure an injunction against the Superintendent of Schools and the County Board of Education, directing the defendants to present a plan of desegregation of the races in the schools and forbidding them to assign Negroes to particular schools because of their race. The complaint was filed on July 29, 1955, as a class action by thirteen adults personally and as the next friends of the forty-five minor plaintiffs, all of whom are Negroes. The defendants filed an answer on September 22, 1955, alleging that the plaintiffs had failed to exhaust the administrative remedies provided by the State, in that they did not comply with the statutes of the State which regulate the assignment and enrollment of pupils in the public schools. On this account, the defendants moved the court to dismiss the suit, and the District Judge after hearing granted the motion.

We are of the opinion that the present case is ruled by the prior decisions of this court in *Carson* v. *Board of Education*, 227 F.2d 789, and *Carson* v. *Warlick*, 238 F.2d 724. In the first of these cases the following statement was made in the per curiam opinion (page 790):

> "* * * The Act of March 30, 1955,* entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools', being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the state. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. * * *"

This case was brought to this court a second time, in *Carson* v. *Warlick*, supra, after the Supreme Court of North Carolina in *Joiner* v. *McDowell County Board of Education*, 244 N.C. 164, had interpreted the Pupil Placement Act of the State, and had held that the factors involved in the selection of appropriate schools for a child

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* This act in its present form is found in the General Statutes of North Carolina, Chapter 115, Article 21, Secs. 115-176 to 115-179. Changes of assignment are regulated by Sec. 115-178.

necessitated the consideration of the application of any child or children individually and not en masse. It was shown to this court that the plaintiffs, in the action in the court below, had not attempted to comply with the provisions of the statute as so interpreted but had merely inquired of the Secretary of the Board of Education what steps were being taken for the admission of colored children to the schools of the town of Old Fort, and that the school authorities in reply merely pointed out that no Negro pupil had made application to attend the school and that the board therefore had no cause to take any action in that connection. We therefore reaffirmed our previous decision and held that the plaintiffs were not entitled to relief because they had not exhausted their administrative remedies. In the course of the opinion Judge Parker said (238 F.2d at 728-729):

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown* v. *Board of Education*, 349 U.S. 294, 299,
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> > * * * * School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles".

"It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much time that the proceedings for admission to a school term will become moot before they can be completed. It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. Lane v. Wilson, 307 U.S. 268, 274. Furthermore, if administrative remedies before a school board have been exhausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while such application was pending. Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board.

"There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. Henderson v. United States, 339 U.S. 816. It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials

in according to citizens of the United States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements, and we see no such violation in the procedure here required. * * *"

We are advertent to the circumstances upon which the plaintiffs rest their case, namely, that the County Board has taken no steps to put an end to the planned segregation of the pupils in the public schools of the county but, on the contrary, in 1955 and subsequent years, resolved that the practices of enrollment and assignment of pupils for the ensuing year should be similar to those in use in the current year. If there were no remedy for such inaction, the federal court might well make use of its injunctive power to enjoin the violation of the constitutional rights of the plaintiffs but, as we have seen, the State statutes give to the parents of any child dissatisfied with the school to which he is assigned the right to make application for a transfer and the right to be heard on the question by the Board. If after the hearing and final decision he is not satisfied, and can show that he has been discriminated against because of his race, he may then apply to the federal court for relief. In the pending case, however, that course was not taken, although it was clearly outlined in our two prior decisions, and the decision of the District Court in dismissing the case was therefore correct. This conclusion does not mean that there must be a separate suit for each child on whose behalf it is claimed that an application for reassignment has been improperly denied. There can be no objection to the joining of a number of applicants in the same suit as has been done in other cases. The County Board of Education, however,

is entitled under the North Carolina statute to consider each application on its individual merits and if this is done without unnecessary delay and with scrupulous observance of individual constitutional rights, there will be no just cause for complaint.

The appellants also raise the point that the District Judge was wrong in rejecting the motion of the plaintiffs to amend the bill of complaint by joining the State Board of Education and the Superintendent of Public Instruction of the State as parties defendant. It is pointed out that the State Board has general control of the supervision and administration of the fiscal affairs of the public schools and other important powers conferred by the General Statutes, secs. 115-4, 115-11 and 115-283. The provisions of sec. 115-178 of the Pupil Placement Act, however, places the authority in the County boards of education to make the assignments and enrollment of pupils and contains no direction for the participation of the State Board of Education in these matters. We therefore think that nothing would be gained by joining these officials as additional defendants and that the judge was correct in denying the motion to amend the complaint.

Affirmed.

Decree

Filed and Entered March 19, 1959.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7802.

HELEN COVINGTON, personally and as mother and next friend of CORNETT COVINGTON, *et al.*,

Appellants,

—vs.—

J. S. EDWARDS, Superintendent of Schools of Montgomery County, North Carolina, E. R. WALLACE, D. C. EWING, HAROLD A. SCOTT, JAMES R. BURT and JAMES INGRAM, members of the Montgomery County Board of Education,

Appellees.

APPEAL FROM the United States District Court for the Middle District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

March 19, 1959.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.